National Labor Relations Board

Weekly Summary of NLRB Cases

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Acklin Stamping Co. (8-CA-36788, 8-CB-10622; 351 NLRB No. 90) Toledo, OH Dec. 28, 2008. The Board remanded the case to the administrative law judge for additional findings and credibility resolutions. The judge found that the Respondent Union violated Section 8(b)(1)(A) and 8(b)(2) and the Respondent Employer violated Section 8(a)(3) and (1) of the Act by discharging employee Niles Menard, based on the Respondent Union's request, for reasons other than failure to pay dues or satisfy other eligibility criteria. The Board acknowledged that under *Operating Engineers Local 478 (Stone & Webster)*, 271 NLRB 1382 fn. 2 (1984), and related cases, there is a presumption of a violation where a union causes an employee's discharge. However, the Board also noted that this presumption can be rebutted by evidence that the employee failed to meet membership requirements under a union security clause or by showing that the union's interference was necessary to the effective performance of its function as employee representative. The Board found that the judge failed to fully consider Respondent Union's proffered evidence potentially rebutting this presumption and failed to make full factual and credibility findings that would allow the Board to do so. The Board concluded that remand was appropriate to resolve these issues and make a determination as to whether the Respondent Union and Respondent Employer violated the Act. [HTML] [PDF]

(Members Liebman, Schaumber, and Walsh participated.)

Charges filed by Niles Menard, an Individual; complaint alleged violations of Sections 8(a)(1) and (3) and Section 8(b)(1)(A) and (b)(2). Hearing at Toledo on Feb. 22, 2007. Adm. Law Judge Bruce D. Rosenstein issued his decision May 4, 2007.

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A and G, Inc., d/b/a Alstyle Apparel (21-CA-37029; 351 NLRB No. 92) Anaheim, CA Dec. 28, 2007. This case involves the Respondent's discharge of several production employees for allegedly playing soccer on the work floor and one shift leader for failing to stop the employees from engaging in the alleged misconduct. The Board adopted the administrative law judge's finding that the shift leader was not a Section 2(11) supervisor. In doing so, the Board found that the Respondent failed to prove that the shift leader responsibly directed the employees or assigned work using the requisite amount of independent judgment. [HTML] [PDF]

Applying *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), the Board also adopted the judge's finding that the Respondent unlawfully discharged the production employees and the shift leader in violation of Section 8(a)(3) of the Act. Regarding the production employees, the Board concluded that the Respondent failed to meet its *Wright Line* rebuttal burden because its limited investigation of the alleged misconduct and its cursory decision to discharge the employees supports a conclusion that the discharges were discriminatorily motivated and not based on a reasonable belief of misconduct. The Board similarly concluded that the Respondent failed to meet its *Wright Line* rebuttal burden with regard to the shift leader. The Board found that the Respondent's disparate treatment of the shift leader and its limited investigation into his alleged misconduct indicates that his discharge was pretextual and discriminatorily motivated.

The Board further found that the Respondent engaged in unlawful surveillance in violation of Section 8(a)(1). In absence of exceptions, the Board adopted the judge's findings that the Respondent violated Section 8(a)(1) by threatening plant closure in the event of unionization, interrogating employees about their union activities, and coercively questioning a union organizer.

The Board granted the General Counsel's request that the notice be posted in English, Spanish, and Vietnamese, but denied his requests for a broad cease-and-desist order and that the notice be read aloud to the Respondent's employees.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Food and Commercial Workers Local 324; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Los Angeles, April 3-7 and 17-19, 2006. Adm. Law Judge Lana H. Parke issued her decision July 12, 2006.

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E. P. Donnelly, Inc. (4-CD-1178; 351 NLRB No. 97) Jamison, PA Dec. 31, 2007. The Board in this Decision and Determination of Dispute under Section 10(k) of the Act decided that the employees represented by Carpenters Local 623 are entitled to continue performing the work in dispute. The work constituted "the installation of prefabricated standing seam metal roofing, soffit, fascia, and related trim to be performed by the Employer at the Egg Harbor Township Community Center." The Employer is E.P. Donnelly, Inc. The work was also claimed by Sheet Metal Workers Local 27. [HTML] [PDF]

In finding that the dispute was properly before the Board pursuant to Section 10(k), the Board rejected Local 27's contention that the Board was precluded from making an affirmative award of the work because of the existence of a Project Labor Agreement (PLA) which covered the work and was signed by both Local 27 and the Employer. Local 27 contended that the PLA was authorized by a New Jersey statute which was not subject to NLRA preemption. Local 27 further contended that any exercise of Board jurisdiction would impermissibly preempt New Jersey law authorizing public entities such as Egg Harbor Township from negotiating PLAs. The Board found that an award of the disputed work to Local 623 would not prevent Egg Harbor Township from exercising its authority under state law to negotiate and execute PLAs, nor would it invalidate the PLA in this case. The Employer would continue to be bound under the terms of the PLA, and the parties to the PLA would retain any rights they may have under state law to bring a suit for damages against the Employer for any breach of the PLA. Furthermore, the Board found that even should its exercise of jurisdiction put the Board at cross purposes with the New Jersey statute, the Board's exercise of jurisdiction was nevertheless valid under the Constitution's Supremacy Clause.

Having found that the dispute was properly before the Board for determination, the Board considered all the relevant factors and found that the employees represented by Local 623 were entitled to continue performing the work based on the factors of employer preference, current assignment, past practice, economy, and efficiency of operations.

In so doing, the Board found that the factors of collective-bargaining agreements, area and industry practice, relative skills and training, and the arbitrator's award of the work to employees represented by Local 27, did not favor awarding the work to either group of employees. As to this last factor, the Board noted that the arbitrator did not consider most of the factors that the Board takes into account in making an award of disputed work under Section 10(k). Rather the arbitrator was limited to the factor of area practice and was required to award the work to one union or the other despite evidence that both unions engaged in substantial work in the area at issue. Unavailable was the alternative of finding that the factor of area practice favored neither union.

(Members Liebman, Schaumber, and Kirsanow participated.)

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Igramo Enterprise, Inc. (29–CA–27247, 27320; 351 NLRB No. 99) Queens, NY Dec. 28, 2007. The Board adopted the administrative law judge's findings that the drivers at issue in this case are employees and not independent contractors and that the Respondent violated Section 8(a)(1) of the Act by taking away a delivery route from employee Gustavo Betancourt because he joined other employees in requesting additional wages and benefits and threatened to go to the Department of Labor to complain about the Respondent's continued treatment of the employees as independent contractors. In the absence of exceptions, the Board also adopted the judge's findings that the Respondent unlawfully threatened employees with discharge and plant closure and by telling them that those who were dissatisfied could find other work. The Board reversed the judge and found that the Respondent also unlawfully discharged driver Orce Frias because of his participation in the employees' protected concerted activities. [HTML] [PDF]

The Board found that the General Counsel established the existence of animus through the unlawful threats to employees and the timing of the discharge. In doing so, the Board held that it was not necessary to establish that the Respondent held particular animus towards Frias even if other participants were not retaliated against when, as here, the facts establish that the Respondent had shown general animus towards the employees' protected activities.

The Board further concluded that the Respondent failed to meet its rebuttal burden to establish that it would have discharged Frias because of prior work mistakes even in the absence of his protected activities, finding the supporting evidence contradictory and that the Respondent decided to discharge Frias for these mistakes only after he engaged in protected activities.

(Members Liebman, Kirsanow, and Walsh participated.)

Charges filed by Orce Frias and Gustavo Betancourth, Individuals; complaint alleged violations of Section 8(a)(1). Hearing at New York between March 21 and April 26, 2006. Adm. Law Judge Raymond P. Green issued his decision Sept. 15, 2006 and his supplemental decision June 29, 2007.

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R. Sabee Co., LLC, Draper Products, Inc., Circle Machinery & Supply Co., Sabee Products, Inc., Stanford Professional Products, Sabee Realty, Inc. and JMS Converters, Inc. d/b/a JMS Converting, a single employer and/or continuing enterprise; et al. (30-CA-16482-1; 351 NLRB No. 100) Appleton, WI Dec. 28, 2007. The Board adopted the findings of the administrative law judge that the Respondents Sabee Products Inc. (SPI) and JMS Converters, Inc. d/b/a JMS Converting (JMS) are single employers and alter egos both of each other and of three other manufacturing companies, R. Sabee Co., LLC (R. Sabee), Draper Products Inc. (Draper), and Circle Machinery & Supply Co. (Circle). The Board also adopted the judge's alternative finding that SPI and JMS are successors of R. Sabee, Draper and Circle. Pursuant to a settlement agreement with the General Counsel, the complaint charges against R. Sabee, Draper, and Circle were withdrawn prior to trial. The Board nonetheless found that as single employers, alter egos and successors of these, three, Respondents SPI and JMS were jointly liable for their violations and for each others Section 8(a)(1), (3) and (5) violations of the Act, which included unlawful layoffs and refusal to recall or rehire bargaining unit employees, unilateral changes, failure to apply contract terms for newly hired employees, failure to respond to the union's information requests, and withdrawal of recognition. The Board reversed the judge and declined to find the Respondents Sabee Realty (Realty) and Stanford Professional Products (Stanford) jointly liable, finding insufficient evidence to support single employer or alter ego status with respect to either. On a procedural issue, the Board rejected the Respondents' argument that state rules of evidence prohibited certain admissions made in state court proceedings from being entered into evidence in Board proceedings. [HTML] [PDF]

(Members Liebman, Kirsanow, and Walsh participated.)

Charge filed by Steel Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers Local 2-932; complaint alleged violations of Section 8(a)(1), (3), and (5). Hearing at Appleton, Nov. 15, 2004, Feb. 14-16, 2005, and Aug. 1, 2006. Adm. Law Judge Jane Vandeventer issued her decision Feb. 6, 2007.

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Network Dynamics Cabling, Inc. (4-CA-30474, et al.; 351 NLRB No. 98) West Chester, PA Dec. 31, 2007. The Board reversed the administrative law judge and found that the Respondent violated Section 8(a)(1) of the Act by offering employee David Hughey a wage increase and promotion in response to his organizational activity. The Board found that the Respondent offered the promotion in an effort to persuade Hughey to abandon his union support. The Board

also adopted the judge's finding that the Respondent violated Section 8(a)(3) by transferring Hughey from the UPS job site because of his union activity. The Board found that the Respondent's claim that UPS compelled the transfer was pretextual. [HTML] [PDF]

Members Liebman and Kirsanow found that the Respondent violated Section 8(a)(1) by interrogating Hughey about his union affiliation. Member Schaumber dissented, stating that Hughey was an open and active union supporter, and that the questioning was therefore not coercive.

The Board majority adopted the judge's findings that the Respondent violated Section 8(a)(1) by coercively interrogating employee Brian Tandarich on two occasions, and violated Section 8(a)(3) by discharging Tandarich. The majority found that Tandarich was not a statutory supervisor, as his direction of employees did not entail the exercise of independent judgment. They adopted the judge's findings that the Respondent unlawfully interrogated Tandarich on two occasions, when representatives of the Respondent met with Tandarich to prepare an affidavit. On the first occasion, the majority found that Tandarich's participation in the interview was not voluntary, noting his objections to participating in the interview. The majority found that the unlawful interrogation continued at the second meeting. The majority found that Tandarich was subsequently discharged for his protected activity of giving the affidavit to a union representative.

Member Schaumber dissented, arguing that the safeguards required by *Johnnie's Poultry Co.,* 146 NLRB 770 (1964), were contained in the affidavit drafted during the first meeting, and that a reiteration of them was not necessary at the second meeting. Member Schaumber also dissented from the majority's findings regarding Tandarich's discharge, finding that Tandarich was discharged for insubordination rather than for protected activity.

The Board reversed the judge and found that the Respondent's threat to prosecute Tandarich if he did not return certain items that it asserted were in his possession, violated Section 8(a)(1). The Board found that such a threat, made to an unlawfully discharged employee who was preparing to testify in a Board hearing, would reasonably tend to interfere with the exercise of Tandarich's Section 7 rights.

The Board adopted the judge's finding that the Respondent did not violate Section 8(a)(3) by transferring employee Thomas Moore from the Arcadia University work site, finding that, due to lack of work, the Respondent would have transferred Moore even in the absence of his union activity. The Board then reversed the judge and found that the Respondent violated Section 8(a)(3) by refusing to assign further work to Moore. The Board adopted the judge's finding that the Respondent violated Section 8(a)(3) by discharging Moore. The Board found that the argument that took place between Moore and supervisor Stevenson concerned Moore's protected activity, and that Moore's defense of his protected activity did not cross the line so as to lose the Act's protection.

The Board affirmed the judge's finding that the Respondent violated Section 8(a)(1) by interrogating employee James Korejko on two occasions. Member Schaumber found it unnecessary to pass on the second alleged interrogation, finding it cumulative of similar violations found.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Electrical Workers IBEW Local 98; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Philadelphia, Jan. 21-23 and Feb. 3, 2003. Adm. Law Judge Arthur J. Amchan issued his decision April 10, 2003.

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Pan American Grain Co, Inc. (24-CA-9138, et al.; 351 NLRB No. 93) Guaynabo, PR Dec. 31, 2007. On remand from the United States Court of Appeals for the First Circuit, the Board reaffirmed its previous finding that the Respondent violated Section 8(a)(5) and (1) of the Act by implementing its Feb. 27, 2002 layoffs without providing the Congreso De Uniones Industriales De Puerto Rico Union with adequate notice and a reasonable opportunity to bargain. In so finding, the Board rejected the Respondent's argument that it did not have a duty to bargain over the layoffs because the layoffs resulted, in part, from the Respondent's ongoing modernization efforts. Rather, the Board found that, because the layoffs admittedly were based, at least in part, on "economic reasons," including reduced consumer demand, the Respondent failed to establish that it would have implemented any particular layoffs solely as a result of its modernization efforts and, therefore, had a duty to bargain over its layoff decision. [HTML] [PDF]

(Members Liebman, Schaumber, and Kirsanow participated.)

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Seaport Printing & AD Specialties, Inc., d/b/a Port Printing AD and Specialties (15-CA-17976; 351 NLRB No. 91) Lake Charles, LA Dec. 28, 2007. In 2005, the mayor of Lake Charles ordered a mandatory evacuation of the city due to the impending arrival of a hurricane. The Respondent was thus forced to close its printing facility, resulting in a layoff of its employees. After the hurricane, the Respondent's owners returned to the facility. Although the building had significant damage, the Respondent began limited operations with a skeleton crew, which consisted of some non-bargaining unit employees and at least one supervisor. [HTML] [PDF]

The administrative law judge found that the Respondent violated Section 8(a)(5) of the Act by failing to bargain with the Union over the decisions to lay off employees and to use non-unit personnel to perform unit work, and the effects of those decisions. The Board reversed the judge's finding that the Respondent violated Section 8(a)(5) by failing to bargain with the Union over the layoff decision. Relying on *Bottom Line Enterprises*, 302 NLRB 373 (1991), enfd. 15 F.3d 1087 (9th Cir. 1994) and *RDE Electronics of S.D.*, 320 NLRB 80 (1995), the Board found that the impending hurricane was an "economic exigency," which necessitated the closing of the

facility and resulted in the forced layoff. Accordingly, the Board majority found that the Respondent was excused from bargaining over the layoff decision. The Board adopted, however, the judge's other findings of violations, concluding that the exigency created by the hurricane did not excuse the Respondent's failure to bargain over the effects of its layoff decision or the decision to use non-unit personnel to perform unit work and the effects of that decision.

Member Schaumber dissented in part. He agreed with the majority that the "economic exigency" created by the hurricane excused the Respondent's failure to bargain over the layoff decision, but stated that he would find that the exigency also excused the Respondent's failure to bargain over the post-hurricane decision to use non-unit personnel to perform unit work. Member Schaumber also stated that he would find that the Respondent's failure to bargain over the effects of the above decisions was not unlawful because the Union waived its right to bargain over these matters.

(Members Schaumber, Kirsanow, and Walsh participated.)

Charge filed by Lake Charles Printing and Graphics Union, Local 260; complaint alleged violation of Section 8(a)(1) and (5). Hearing at Lake Charles, Dec. 4 and 5, 2006. Adm. Law Judge John H. West issued his decision Feb. 7, 2007.

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Sunshine Piping, Inc. (15-CA-16781; 351 NLRB No. 89) Panama City and Cedar Grove, FL Dec. 31, 2007. The Board considered exceptions both to the administrative law judge's initial decision and her supplemental decision upon a reopened record. In her initial decision (*Sunshine II*), the judge found that Respondent violated Section 8(a)(1), (3), and (4) of the Act by discriminatorily issuing performance-based disciplinary warnings to an employee, but did not violate the Act by disciplining, suspending, and terminating him under a new attendance policy. Specifically, the judge found that the General Counsel established an initial case under *Wright Line,* 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), that animus against the employee's protected activity was a motivating factor in Respondent's attendance-related actions, but that Respondent met its *Wright Line* rebuttal burden with testimonial and documentary evidence showing no disparate treatment against that employee under the attendance policy. The judge dismissed allegations that Respondent violated Section 8(a)(1) by threatening the employee that the Respondent no longer wanted him employed and by failing to take action to stop other employees from harassing him. [HTML] [PDF]

Shortly before the judge issued her initial decision, a former employee, who had testified for Respondent in the initial hearing, came forward and claimed that Respondent had altered attendance records to hide its disparate treatment of the alleged discriminatee. The judge granted the General Counsel's motion to reopen the record, and having considered the newly discovered evidence, amended her decision to find that Respondent also violated Section 8(a)(1), (3), and (4) by disciplining and terminating the employee for his attendance violations ("*Sunshine III*"). The judge

further found that the Respondent's alteration of documents justified an award of litigation costs associated with *Sunshine III* to the General Counsel under the "bad faith" exception to the "American Rule."

The Board, 3-0, adopted the judge's findings and conclusions as to the substantive allegations of the amended complaint. Contrary to the judge's decision, however, the Board, 2-1 (Member Liebman dissenting), reversed the judge's award of litigation costs. The Board found that, for the purpose of deciding whether the employee's attendance-related discipline and discharge violated the Act, Respondent's alteration of documents negated its ability to meet its *Wright Line* rebuttal burden. But for the purpose of deciding whether Respondent was guilty of bad faith in presenting a defense based on altered attendance records in *Sunshine II*, so as to justify fee-shifting, the majority found the fact that the alterations were amenable to conflicting explanations to be significant, and said that they could not "conclude that the Respondent's defense was 'entirely without color' and 'wantonly asserted.'"

(Members Liebman, Schaumber, and Kirsanow participated.)

Charge filed by Plumbers Local 366; complaint alleged violations of Section 8(a)(1), (3), and (4). Hearing at Panama City, April 28-30, 2003 and between Aug. 10 and Oct. 15, 2004. Adm. Law Judge Margaret G. Brakebusch issued her decision June 30, 2003 and her supplemental decision Dec. 23, 2004.

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Talmadge Park, Inc. (34-CA-11295, 34-RC-2136; 351 NLRB No. 87) East Haven, CT Dec. 28, 2007. This is a consolidated unfair labor practice and representation case where the Board adopted the administrative law judge's findings. [HTML] [PDF]

The Board adopted the judge's finding that the Respondent failed to establish that laundry supervisor Kathleen Proto was a 2(11) supervisor. In doing so, they found it unnecessary to pass on the judge's finding that Proto had no employees under her because they agreed with the judge that she did not have authority to responsibly direct employees with independent judgment. The Board also adopted the judge's following findings without discussion: that the Respondent violated Section 8(a)(1) of the Act by telling Proto that she could not wear union insignia or talk about the Union while at its facility, and that the Respondent violated Section 8(a)(3) and (1) by disciplining Proto because she engaged in Union activity.

As for representation, the Board adopted without discussion the judge's finding that Proto's prounion conduct did not interfere with the election. While the judge recommended remanding the representation case to the Regional Director to issue the appropriate certification, the Board noted that it had the authority to issue such a certification. Thus, because the Union prevailed in the election, the Board issued a Certification of Representative.

(Members Liebman, Schaumber, and Walsh participated.)

Charges filed by New England Health Care Employees District 1199, SEIU; complaint alleged violations of Section 8(a)(1) and (3). Hearing at Hartford, April 3-5, 2006. Adm. Law Judge Richard A. Scully issued his decision July 17, 2006, and his supplemental decision Jan. 19, 2007.

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Edw. C. Levy Co. d/b/a The Levy Co. (25-RD-1490; 351 NLRB No. 85) Burns Harbor, IN Dec. 28, 2007. The Board, contrary to the hearing officer, overruled the Union's election objections, finding that the Employer did not threaten replacement employees with the loss of their jobs, or link the security of their jobs to the results of the decertification election. [HTML] [PDF]

When the Union went on strike against the Employer in Aug. 2005, the Employer continued its operations using supervisors and replacement employees who were offered permanent employment in March 2006. Pursuant to the Stipulated Election Agreement, both replacement employees and striking employees were permitted to vote in the decertification election that was scheduled for Oct. 27, 2006.

The Employer and the Union continued to meet during the strike to negotiate a new agreement and to resolve strike issues. In several negotiating sessions before the election, the Union proposed that the Employer return all former employees (strikers) to work. In answer to the Employer's queries as to how many strikers would return to work, the Union's representative stated that, to the best of his knowledge, "probably 30 to 40 employees" or "around 50 percent" of the strikers had found other work, and "that he was not sure they would be back."

The Employer discussed the decertification election with employees on several occasions prior to the election. The Employer's representatives urged the employees to vote against the Union and told them they could possibly lose their jobs, that part of the Union's negotiations was to "get rid of replacement workers" and "let all the [strikers] have their jobs back," that the election outcome "will determine the future of [the Employer's] business and your job at Levy," that the Union had proposed that the Employer put all strikers back to work, and that if the Union were voted out, the Employer "will no longer be required to negotiate with Local 150 (strikers will not be able to take your jobs)."

The hearing officer recommended that the Board find that the Employer's pre-election statements constituted objectionable conduct. The hearing officer found that although the Union proposed that all strikers be returned to work, the Union did not actually expect that all strikers would, in fact, return to work. Although finding that the Employer did not present employees with inaccurate or false details of the Union's proposals, the hearing concluded that the Employer "selectively left out portions of" the Union's proposals and gave employees only "pieces" of those proposals by omitting the Union's estimate of the number of strikers who might return to work. The hearing officer concluded that the Employer's statements were

misleading, and that, coupled with its comment that the outcome of the election would determine the security of the replacement employees' jobs, raised the prospect that employees could lose their jobs.

Contrary to the hearing officer, the Board concluded that the Employer was not compelled to tell employees that the Union did not expect all strikers to return to work, finding that the Union's comments that some strikers might not return to work constituted a "guess" or estimate that was not part of the Union's formal bargaining proposal that sought the return of all striking employees. The Board found that the Employer's comments were consistent with the Union's bargaining proposals, and that the Employer lawfully discussed with employees the possible consequences, both positive and negative, that could ensue if the Union's bargaining proposals were accepted. The Board emphasized that the Employer's discussions with employees were devoid of threats or promises, and, in fact, the Employer stressed to its employees that they were permanent and that the Employer wished to retain them as its work force. The Board concluded, accordingly, that the Employer had not engaged in objectionable conduct and that the ballots cast by replacement employees in the decertification election should be opened and counted.

(Members Schaumber, Kirsanow, and Walsh participated.)

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Media General Operations, Inc. d/b/a The Tampa Tribune (12–CA–24770; 351 NLRB No. 96) Tampa, FL Dec. 28, 2007. The Board unanimously concluded, contrary to the administrative law judge, that the Respondent violated Section 8(a)(1) of the Act by discharging employee Gregg McMillen for referring to Respondent's vice-president of operations, Bill Barker, as a "stupid fucking moron" in the course of McMillen's protected concerted discussion of ongoing contract negotiations and responding to Barker's own statements about negotiations. [HTML] [PDF]

McMillen's remark, which was heard only by supervisors Glenn Lerro and Joel Bridges, was provoked by letters from Barker. During contract negotiations, Barker had sent unit employees a series of letters, describing the negotiations from the Respondent's viewpoint and blaming the Union for delays in reaching a contract. Barker's antiunion letters had angered many employees and had caused about 25 employees, including McMillen, to sign a group letter to Barker, criticizing their working conditions, blaming the Respondent's management for the lack of negotiating progress, and expressing support for the Union's contract proposal. A few days later, upon hearing from a coworker that Barker had sent another letter, McMillen told Lerro and Bridges, "I hope that [stupid] fucking [moron] doesn't send me another letter. I'm pretty stressed, and if there is another letter you might not see me. I might be out on stress." During this conversation, McMillen also criticized the slow pace of negotiations and the Respondent's wage proposal. Neither supervisor criticized McMillen for the remark or suggested that discipline was appropriate, but Lerro reported the incident, and McMillen was discharged because of it six days later.

The Board agreed with the judge that McMillen's profane reference to Barker occurred in the course of concerted activity. Although McMillen's criticism of Barker's letters on that occasion was not expressly authorized by or in the presence of other unit employees, McMillen's comments were "a logical outgrowth" of the prior collective and concerted activity in which he was already engaged, including the group response to Barker's letters. In assessing whether McMillen nonetheless lost the Act's protection because of the opprobrious nature of his outburst, the Board applied *Atlantic Steel*, 245 NLRB 814 (1979), which requires balancing four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by an employer's unfair labor practice. Like the judge, the Board concluded that the first two factors weighed in favor of finding McMillen's outburst protected, while the final factor weighed slightly against protection, because Barker's letters, which provoked the outburst, were not unlawful.

Contrary to the judge, however, the Board found that the nature of McMillen's outburst weighed only moderately against his retaining the Act's protection. Significantly, his remark was not *directed at* Barker (i.e., not to his face) and involved no confrontational aspects; McMillen made the remark only once; he apologized to Lerro for the comment spontaneously and without knowing that any discipline was contemplated; and though disrespectful, the remark was not insubordinate with regard to work assignments or Barker's managerial authority. The Board distinguished cases relied on by the Respondent, which involved more severe employee conduct. Finally, the Board observed that neither Barker's high-level position nor his status as the Respondent's chief negotiator and disseminator of its views shielded him from employees' responses.

Concluding, contrary to the judge, that the factors favoring McMillen's retention of the Act's protection outweighed the factors favoring loss of protection, the Board found his discharge unlawful and ordered standard remedies, including McMillen's reinstatement.

(Members Liebman, Kirsanow, and Walsh participated.)

Charge filed by Gregg McMillen an Individual; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Tampa, FL, Dec. 4-5, 2006. Adm. Law Judge Joel P. Biblowitz issued his decision Feb. 22, 2007.

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United Steel Service, Inc., d/b/a Uniserv (8-CA-32711, et al.; 351 NLRB No. 86) Brookfield, OH Dec. 31, 2007. The Board unanimously affirmed the administrative law judge's finding that the Respondent violated Section 8(a)(5) of the Act by refusing to provide the Union with requested relevant information, and by unilaterally changing its substance abuse policy. The Board found that a make-whole remedy for employees discharged under the new substance abuse policy was warranted, but also noted that the Respondent is permitted to establish during compliance that it would have discharged any particular employee under its previous policy. [HTML] [PDF]

Members Liebman and Kirsanow adopted the judge's finding that the Respondent violated Section 8(a)(5) by unilaterally changing its holiday and vacation policy. The Board majority also noted that, under the old policy, employees were able to request an additional day of leave when their vacation day fell on a holiday, but could not do so under the new policy. Member Schaumber dissented, finding that the Respondent was merely exercising its discretion to deny such requests due to manning requirements, and had not materially changed the policy.

(Members Liebman, Schaumber, and Kirsanow participated.)

Charges filed by Auto Workers [UAW] Region 2-B; complaint alleged violations of Section 8(a)(1) and (5). Hearing at Cleveland on May 17-18, 2006. Adm. Law Judge Karl H. Buschmann issued his decision Sept. 22, 2006.

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Valerie Manor, Inc. (34-CA-11162, et al.; 351 NLRB No. 94) Torrington, CT Dec. 28, 2007. The Board adopted the administrative law judge's findings that the Respondent engaged in extensive violations of Section 8(a)(1) of the Act. The Board also set aside an election held April 14, 2005, and directed a second election. In the absence of exceptions, the Board adopted the judge's recommended broad cease-and-desist order. [HTML] [PDF]

The Board reversed the judge's finding that the Respondent's acting administrator engaged in surveillance of the Respondent's employees in violation of Section 8(a)(1), an allegation that was not pled in the complaint or litigated at the hearing.

Member Kirsanow disagreed with the judge's recommendation of a broad cease-and-desist order. Member Kirsanow also disagreed with the judge's finding that the Respondent solicited its employees to revoke their union authorization cards.

(Members Liebman, Kirsanow, and Walsh participated.)

Charges filed by New England Health Care Employees District 1199, SEIU; complaint alleged violation of Section 8(a)(1). Hearing at Hartford, Nov. 7-10, 2005. Adm. Law Judge Howard Edelman issued his decision June 23, 2006.

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Valley Hospital Medical Center, Inc. (28-CA-21047; 351 NLRB No. 88) Las Vegas, NV Dec. 28, 2007. In this case, the Board held that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Joan Wells, a full-time registered nurse and the Union's chief steward and executive vice-president. In this connection, the Board found that Wells had engaged in protected activity when, in connection with an ongoing labor dispute over staffing levels at the Respondent's hospital, she made various statements – contained in a newspaper article, on a union web site, and in a union flyer, respectively – regarding the effects of staffing levels on employees and patients. As Wells' discharge was based on that protected

activity, the Board concluded that the discharge violated the Act. The Board also denied the Charging Party's request for additional remedies, specifically rescission of the Respondent's employee communications policy and a provision requiring the Respondent to distribute the notice to employees by handbill and e-mail. In the latter connection, Members Liebman and Walsh concurred for institutional reasons, but noted their view that the Board's standard notice-posting provision encompasses e-mail distribution if an employer customarily disseminates notices to its employees electronically, and that to the extent there is any uncertainty that the current notice-posting language requires electronic posting, they would revise that language to so state. [HTML] [PDF]

(Members Liebman, Kirsanow, and Walsh participated.)

Charge filed by Nevada Service Employees Local 1107; complaint alleged violation of Section 8(a)(1) and (3). Hearing at Las Vegas, March 27-28, 2007. Adm. Law Judge Lana H. Parke issued her decision May 23, 2007.

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LIST OF DECISIONS OF ADMINISTRATIVE LAW JUDGES

Wynn Las Vegas, LLC (Individuals) Las Vegas, NV Dec. 31, 2007. 28-CA-21073, et al.; JD(SF)-39-07, Judge Burton Litvack.

Mastec Advanced Technologies, a division of Mastec, Inc. and DirecTV (Individuals) Orlando, FL Jan. 4, 2007. 12-CA-24979, 25055; JD(ATL)-41-07, Judge Michael A. Marcionese.

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TEST OF CERTIFICATION

(In the following case, the Board granted the General Counsel's motion for summary judgment on the grounds that the Respondent has not raised any representation issue that is litigable in this unfair labor practice proceeding.)

Richmond Health Care d/b/a Sunrise Health and Rehabilitation Center (Service Employees Local 1999) (12-CA-25504; 351 NLRB No. 95) Sunrise, FL Dec. 31, 2007.

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